

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: ***Evans Builders, Inc. v. David Ebersole***
C.A. No.: S12A-02-004 RFS

Employer's Appeal of a Decision of the Industrial Accident Board.
Affirmed as Modified by Citation.

Submitted: July 9, 2012
Decided: October 11, 2012

Dear Counsel:

This is my decision on appeal of a decision of the Industrial Accident Board ("Board"). It appears that the Board was not asked to make a disability award but to determine whether Claimant David Ebersole's lung disease is a "compensable occupational disease" pursuant to 19 *Del.C.* § 2301(4). The Board found that it is. This Court affirms the substance of the Board's decision while modifying a citation.¹

¹On appeal of a Board decision to the Superior Court, the Court "may reverse, affirm or modify the award of the Board or remand the cause to the Board for a rehearing." 19 *Del.C.* § 2350(b). On the posture of this case, the Court performs its appellate role by affirming the substance of the Board's decision and modifying a citation.

Facts. Claimant worked for Employer Evans Builders, Inc. (“Evans”) as a carpenter in poultry houses and processing plants from Spring 2004 until November 2007. Prior to working at Evans, Claimant held jobs unrelated to the poultry industry and experienced various pulmonary problems not related to MAI.

In November 2007, Claimant was hospitalized for pneumonia but did not heal despite extensive treatment. In April 2008, a microbacterium avium culture, that is, bacteria, was found on his lung. He was diagnosed with mycobacterium avium intracellulare (“MAI”), a disease which results from exposure to microbacterium avium present in certain environments. MAI can cause pulmonary infections, inflammation and pneumonia. Part of Claimant’s left lung was removed because it did not respond to other treatments. When he was released from the hospital, Claimant was bedridden for a year and a half. He has not been able to work since November 2007 and remains in the care of a pulmonologist.

The Board hearing. Counsel agreed that the sole issue before the Board was whether Claimant’s MAI was related to his work. The Board’s decision was consistent with this agreement. The parties agreed that Claimant’s treatment for MAI was reasonable and necessary, but Evans disputed compensability. The Board concluded that Claimant’s MAI was causally related to his work and that MAI is compensable.

Peter B. Bandera, M.D., who is board-certified in physical medicine and rehabilitation, was asked to assess Claimant for a permanency rating in October 2008. At the hearing he testified by deposition. Dr. Bandera testified that to a reasonable degree of medical probability Claimant developed MAI related to his work in the poultry industry. Dr. Bandero also testified that Claimant’s lung problems and smoking made him more susceptible to developing MAI.

John Penek, M.D., a pulmonologist who runs a pulmonary rehabilitation program, also testified on Claimant’s behalf. He examined Claimant in October 2011 and testified by deposition at the hearing. At the time of the physical examination, Claimant was wasted, thin and very short of breath. Based on Claimant’s medical records, Dr. Penek stated that despite Claimant’s history of pulmonary problems, his general respiratory health was fairly good just prior to working at Evans. Claimant had some symptoms of asthmatic bronchitis at that time, which worsened after he began at Evans. From 2005 through November 2007, when he was hospitalized, Claimant developed shortness of breath and a worsening cough. He was diagnosed with MAI in 2007 and had part of his lung removed. He never fully recovered.

Dr. Penek stated that intense exposure to the MAI organism in the poultry environment was “very likely the cause of the development of his infection.” Penek Dep. at 13. Further, despite Claimant’s pre-existing respiratory problems (typical of patients who develop MAI), the exposure to the chicken industry from 2004 to 2007 was a “significant causal factor in the development of this infection.” *Id.*

When asked about the significance of the articles reporting on certain professionals studies Dr. Penek referred to in his testimony, he said the articles indicate that humans get MAI from exposure to animals, poultry and other substances such as dust. In his words “this guy basically did construction on chicken coops and tore them apart and rebuilt them for years. There was a lot of soil around. So this is the type of environment that is basically the reservoir for these organisms.” Penek Dep. at 18.

Albert Rizzo, M.D., a board-certified pulmonologist, testified by deposition on Employer’s behalf, stating his opinions to a reasonable medical probability. Dr. Rizzo examined Claimant in October 2008. He described mycobacterium avium intercellular as bacteria that are not transmitted from human to human but are inhaled with the air. In Dr. Rizzo’s opinion, most patients with MAI, including Claimant, develop it because of other lung conditions that weaken local immune systems.

Dr. Rizzo stated that with his own MAI patients, who are middle-aged women with no exposure to chickens, he has never identified the source of the bacterial exposure. Nor did he identify a source of Claimant’s exposure. Dr. Rizzo concluded that Claimant developed MAI because his weakened lungs made him more likely to develop it. Dr. Rizzo did not believe that Claimant’s MAI was related to his carpentry work for Evans in the poultry industry.

The Board’s decision. The Board found Claimant credible in his description of his job duties at Evans and the progression of his MAI symptoms. The Board found Dr. Rizzo to be unpersuasive because he simply attributed the MAI to Claimant’s susceptibility and because he did not identify any place Claimant had been exposed to the bacteria. The Board was not persuaded by Dr. Bandera because he is not a pulmonologist and examined Claimant only for a permanency evaluation.

The Board accepted the opinion of Dr. Penek, who explained that research indicates that the MAI organism is prevalent in sawdust, soil and around chickens. While Dr. Rizzo was unaware of a source for Claimant’s exposure, Dr. Penek identified the poultry industry as a common source of MAI. The Board accepted Dr. Penek’s opinion that Claimant’s MAI was causally related to his predisposition to an MAI infection and to his exposure to the MAI organism in the poultry industry.

Discussion. Employer argues first that the Board applied the *Reese*² standard of “substantial cause” rather than the *Anderson*³ test for determining whether MAI is a compensable occupational disease. Ebersole argues that the Board addressed both prongs of *Anderson* despite the incorrect citation.

In *Anderson*, the Delaware Supreme Court set the standard for determining whether an illness is a compensable occupational disease under 19 *Del.C.* § 2301(4). In *Anderson*’s language, the claimant must produce evidence that the employer’s working conditions produced the ailment as a natural incident of the employee’s occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general.⁴

In this case, the Board accepted Claimant’s testimony that prior to working at Evans, he worked on oil rigs, as a glazer, as a residential carpenter and a carpet layer on boats, in residences and commercial buildings without experiencing MAI. He developed MAI while working at Evans. Claimant described the dead chickens, chicken parts and chicken excrement, as well as the masses of chickens he worked around during his time at Evans. In conjunction with Dr. Penek’s opinion that the MAI organism is more prevalent in the poultry industry than in other environments, Claimant met his burden under *Anderson*.

Perhaps in less than artful fashion, the Board made the *Anderson* analysis. The testimony of all witnesses was accurately summarized, including Claimant’s testimony that he never contracted MAI infection until he worked around chickens. In its discretion, the Board accepted Dr. Penek’s opinion that MAI is more prevalent in sawdust, in soil and around chickens as at Evans than in milk, water and on pets as suggested by Dr. Rizzo.⁵ The Board found that Claimant was exposed to MAI more at work where the organism is more prevalent. The Board concluded that in combination with his susceptibility to MAI, Claimant’s MAI was causally related to his job duties and that the MAI illness was compensable.⁶ The Board considered the *Anderson* factors and made the required findings, despite being roundabout. The Board’s discussion and conclusions have the same meaning as the *Anderson* language. The Court concludes that the Board’s decision is based on

²*Reese v. Home Budget Center*, 619 A.2d 907 (Del.1992).

³*Anderson v. General Motors Corp.*, 442 A.2d 1359 (Del.1982).

⁴*Id.* at 1361.

⁵*DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102 (Del.1982).

⁶The issue of a pre-existing condition was not litigated. 19 *Del.C.* § 2329.

substantial evidence and is free from legal error.⁷

This case is a far cry from *Anderson*. The denial of Anderson's petition was affirmed because the Court concluded that the only reasonable conclusion based on the evidence was that the claimant's disease did not result from the peculiar nature of his employment.⁸ Here, Ebersole's testimony and the expert opinion of Dr. Penek combine to meet the substantial evidence standard. In *Diamond Fuel Oil v. O'Neal*,⁹ the Court affirmed benefits where the experts testified in terms of "reasonable medical probability," "more likely than not," and "most probably." Further, O'Neal showed that a fuel oil to which he had been exposed to at work had known health hazards and that his kidney disease was a natural incident of his employment. In *Diamond Fuel*, although on a different posture, the claimant produced evidence similar to the evidence presented here.

Finally, because the Board's analysis is consistent with *Anderson*, the citation to *Reese* bears no weight and warrants only correction of the citation.

Conclusion. The decision of the Board finding that David Ebersole's MAI condition is a compensable occupational disease pursuant to 19 *Del.C.* § 2301(4) is **AFFIRMED as MODIFIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary

⁷*Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del.1999).

⁸*Anderson*, at 1361.

⁹734 A.2d at 1066.

